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FEDERAL COMMUNICATIONS COMMISSION
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Bruce Collins
Vice President and General Counsel

August 18, 1993

92-264 /

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: C-SPAN's Comments in MM Docket 93-332

Dear Ms. Searcy:

Enclosed are one original and 9 copies of National Cable Satellite Corporation's (d/b/a C-SPAN) comments in the above-referenced docket as required by Sec. 1.419 of the Commission's rules.

If you have any question about these comments please contact me at (202) 626-7950.

Sincerely,

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

AUG 18 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Sections
11 and 13 of the Cable Television
Consumer Protection and Competition
Act of 1992

Horizontal and Vertical Ownership
Limits, Cross-Ownership Limitations
and Anti-Trafficking Provisions

MM Docket No. 92-264 ~~92-332~~

To: The Commission

COMMENTS
of the
NATIONAL CABLE SATELLITE CORPORATION (C-SPAN AND C-SPAN 2)

The National Cable Satellite Corporation ("NCSC"), the exclusive distributor of C-SPAN and C-SPAN 2, two full-time public affairs programming services created by the cable television industry, respectfully submits its comments in the above-referenced proceeding.

Background

These comments constitute the third instance since the passage of the Cable Act in which NCSC makes the case to the Commission that its rulemaking should not overlook NCSC's unique status among cable programmers as a non-stock, non-profit organization.

In the Commission's rate regulation order¹ NCSC petitioned for reconsideration of the rule preventing cable operators from passing through to their subscribers any rate increase exceeding the inflation level from cable programmers affiliated with MSOs. We argued that the rule serves no purpose if applied to C-SPAN and C-SPAN 2, and that it would seriously impede the public affairs networks' ability to maintain even current levels of operations by squeezing their only revenue source. That petition is still pending. Later, NCSC raised the same issue in comments on the Commission's proposed rules in the cost-of-service proceeding.² In that proceeding the Commission sought comment on rules that would regulate transactions between cable operators and their affiliated businesses, including transactions concerning programming. The Commission indicated that the proposed regulations, aimed at identifying cross-subsidy-like transactions, might even replace its inflation limitation on the pass-through of programming costs from affiliated programmers.³ NCSC argued that its non-profit, non-stock form justified an exemption from the definition of "affiliated programmer" as the term was used in that proceeding.

Conversely, with respect to the program access rules, NCSC

¹ Report and Order and Further Notice of Proposed Rule Making in MM Docket No. 92-266, FCC 93-177, 58 FR 29736 (May 21, 1993)

² Notice of Proposed Rulemaking in MM Docket No. 93-215 (Rate Regulation), Released July 16, 1993.

³ Ibid. Para. 67, Fn. 70.

acknowledged that it's non-stock, non-profit status was not fundamentally at odds with the rules' goal of expanding the access of non-cable distributors to cable-created programming. In the program access context, NCSC was appropriately classified as a vertically integrated satellite cable programming vendor. Such regulatory harmony is not the case here, however. That is why NCSC comes to the Commission again with the same issue.

Discussion

In this proceeding the Commission seeks comment on, among other things, a series of proposals that would establish horizontal and vertical ownership limits within the cable industry, including a proposed limit on the number of channels a cable operating company may devote to a programming service in which it has an ownership interest. This "channel occupancy limit" is in response to a Congressional finding that the cable industry has become "increasingly vertically integrated, and that as a result, cable operators have the ability and the incentive to favor their affiliated programmers."⁴ Clearly, the incentive of which the Congress speaks is an economic incentive, and the resulting favoritism toward affiliated programmers is thought to be motivated by economic gain to the cable system owner of the affiliated programming service. As we noted in our earlier filings before the Commission, and as we note here again below,

⁴ Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-264 (Horizontal and Vertical Ownership Limits, etc.), Released July 23, 1993. ("Notice") Para 167 .

the economic factors underlying the proposed rules are simply absent with respect to C-SPAN and C-SPAN 2. The final rules should reflect that reality.

NCSC's specific concern is the ownership attribution standard that the Commission will use in applying the channel occupancy limits on individual cable operators. The Commission has proposed using the broadcast attribution standard.⁵ Frankly, we would have been concerned no matter which of the many attribution standards available to it the Commission selected. The fact is that none of the traditional measures of ownership in either the broadcast, common carrier, or cable/telco contexts (or even any of the non-traditional measures suggested by other parties) take into consideration the special circumstances of a non-profit, non-stock entity such as NCSC. Unless the Commission recognizes our unique status in devising an ownership attribution standard, C-SPAN and C-SPAN 2 and their cable system affiliates will face unnecessary and unfair treatment upon the effective date of the proposed rules.

As a non-stock, non-profit corporation with tax-exempt status,⁶ it is impossible for NCSC or its cable operator affiliates to engage in the sort of economically motivated favoritism feared by Congress and the Commission. As a non-stock

⁵ Ibid., Para. 197.

⁶ NCSC is organized as a non-profit corporation under District of Columbia law, and is exempt from the payment of federal taxes pursuant to I.R.C. Sec. 501(c)(3).

entity, NCSC can not be said to have private owners who might benefit from an increase in value of their ownership share of the corporation as a result of increased carriage of C-SPAN and C-SPAN 2. Without shares of stock, NCSC lacks a method of transferring ownership or value even it wanted to do so. As a non-profit corporation, NCSC is limited by state law from transferring income or assets to its members, directors or officers.⁷ Moreover, as a tax-exempt organization NCSC risks losing that beneficial status if its operations result in unreasonable private inurement or private benefit to any person, or if it acts beyond its charitable and educational mandate. Clearly, NCSC, or any similarly structured cable programmers (if there are any), are not the targets at which the proposed attribution standard is aimed.

Without an accommodation for C-SPAN and C-SPAN 2, their current and future cable operator affiliates would be unfairly penalized by being required to count carriage of the two services against the channel occupancy limit (whatever that limit turns out to be) without advancing the purpose of that limit--that is, mitigation of the economic incentives toward vertical integration. The result of such a misapplication of the limit means that subscribers to a cable system could be prevented from viewing two additional cable programming services they might enjoy and that the cable operator might otherwise be able to

⁷ D.C. Code, Sec. 29-501 et seq.

provide on that system, but for the limit.

NCSC is also mindful of another result. Some cable operators faced with the channel capacity limit might be forced to respond to purely economic pressures by cutting back, or dropping entirely, carriage of one or both of C-SPAN and C-SPAN 2 in order to free up channels for revenue-generating programming services.* This result would add to the list of consequences of the Cable Act not intended by Congress or the Commission. We are loathe to repeat our experience with the must carry rules which to date have resulted in a loss or reduction of carriage of C-SPAN and C-SPAN 2 to nearly one million households⁹--another unintended consequence of the Cable Act. At this point, it is impossible to say how, or even whether, the proposed channel capacity limitation might affect actual carriage of our services. Our point here is that there is no reason we should have to make that calculation.

Solution

The solution is simple. The Commission should write the vertical attribution standard with an exemption for non-stock,

* NCSC charges its affiliates a fee to carry C-SPAN and C-SPAN 2. The services contain no advertising, and thus do not generate any advertising revenue that could be shared with cable system affiliates.

⁹ As of this writing, NCSC estimates that between 800,000 to 900,000 households will experience either a cutback in, or a total loss of access to either C-SPAN or C-SPAN 2 when the must carry rules go into effect later this year. We will not have a count of the actual carriage loss until after the effective date of the rules.

non-profit programming services--an exemption that would include C-SPAN and C-SPAN 2.¹⁰ Such an exemption would be fully compatible with exemptions the Commission has already proposed to achieve Congressional policy goals. For example, the Commission has proposed an exemption for minority-owned programmers.¹¹ It has recognized a public policy reason to exempt local and regional programmers as well.¹² And, it would eliminate the channel occupancy limits altogether for those cable systems facing effective competition in their service areas.¹³

Conclusion

For the foregoing reasons, the Commission should write the vertical ownership attribution standard in such a way as to

¹⁰ Such an exemption should not be made specific to NCSC. The future will almost certainly see the emergence of other non-stock, non-profit cable programmers on either a national or regional basis.

¹¹ Notice, Para. 207.


¹² Ibid., Para. 219.

¹³ Ibid., Para. 231.

exempt non-profit, non-stock cable programming services such as NCSC's C-SPAN and C-SPAN 2 from the proposed channel capacity limit.

Respectfully submitted

NATIONAL CABLE SATELLITE
CORPORATION

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